

No. 90-507

3

Supreme Court, U.S.

FILED

DEC 21 1990

JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

E. WARNER BAILEY, ET UX., PETITIONERS

v.

EAST TEXAS PRODUCTION CREDIT ASSOC., ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARK I. ROSEN
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

JOAN E. SMILEY
Senior Counsel

ROBERT D. MCGILLICUDDY
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners may not raise on appeal certain issues of fact that were not presented to the district court.



TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

<i>D'Oench, Dukme & Co. v. FDIC</i> , 315 U.S. 447 (1942)	3
<i>Forro Precision, Inc. v. IMB Corp.</i> , 745 F.2d 1283 (9th Cir. 1984)	7
<i>Inland Cities Express, Inc. v. Diamond National Corp.</i> , 524 F.2d 753 (9th Cir. 1975)	7
<i>Katsev v. Coleman</i> , 530 F.2d 176 (8th Cir. 1976)	7

Statute:

Bankruptcy Code:

Ch. 7, 11 U.S.C. 701 <i>et seq.</i>	2
Ch. 11, 11 U.S.C. 1101 <i>et seq.</i>	2
12 U.S.C. 1823 (e)	6



In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-507

E. WARNER BAILEY, ET UX., PETITIONERS

v.

EAST TEXAS PRODUCTION CREDIT ASSOC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is unpublished, but the decision is noted at 902 F.2d 956 (Table). The opinion of the district court (Pet. App. A20-A25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1990. On August 8, 1990, Justice White issued an order extending the time within which to file a petition for a writ of certiorari to and including September 21, 1990. The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1976 and 1985, petitioners E. Warner Bailey and his wife negotiated and renegotiated with various creditors a collection of promissory notes secured by liens on two tracts of land they owned in East Texas. Pet. App. A3. In obtaining the loans, the Baileys represented that the tracts were not their homestead. The notes relevant to the proceedings below were executed in favor of the East Texas Production Credit Association (ETPCA), the Small Business Administration (SBA), and RepublicBank-Lufkin, Texas (RBL). While this case was pending RBL was declared insolvent and the Federal Deposit Insurance Corporation (FDIC) succeeded to RBL's interest in its capacity as receiver for RBL.

In 1985, the Baileys filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, which was converted over their objection to a Chapter 7 liquidation proceeding. Although they had represented that the tracts at issue were not their homestead when they negotiated the promissory notes, the Baileys asserted a homestead claim in the bankruptcy proceedings with respect to the tracts. Their bankruptcy generated a number of adversary proceedings, several of which were consolidated in the action below. Pet. App. A3-A4.

2. The parties reached an agreement in 1988 in which the Baileys agreed to drop their homestead claim and the creditors agreed not to challenge the dischargeability of the Baileys' unsecured deficiencies. Pet. App. A4-A5. At a docket call on September 12, 1988, the FDIC moved for summary judgment, asserting that it possessed facially valid liens on the two tracts of property, and that any defenses the Baileys may have had against RBL with respect to these liens were barred against the FDIC under

the rule set forth in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). Pet. App. A5. The basis for the FDIC's motion was that the Baileys' homestead claim was not set out on the face of their promissory notes but, to the contrary, they had denied that they used the tracts as their homestead. The Baileys' counsel conceded that the FDIC's motion was "well taken," a concession the court viewed as a stipulation to the FDIC's right to judgment, and neither Mr. Bailey nor his counsel objected. *Id.* at A5-A6.

Counsel for the ETPCA then read into the record various stipulations that he claimed the parties had agreed to as part of the settlement negotiations. The stipulations added that the ETPCA and the SBA, as well as the FDIC, had valid liens on the Baileys' property and that those liens were not impaired by the homestead exemption. All counsel present, including counsel for petitioners, confirmed the stipulations on the record, as did Mr. Bailey. Based on the stipulations, the court indicated that it would grant the FDIC's motion, and entered an order granting summary judgment in favor of the FDIC on September 21, 1988. Pet. App. A6.

Two days after the court entered summary judgment in favor of the FDIC, the Baileys filed a response to the FDIC's motion denying the validity of the liens and asserting a homestead exemption. Counsel for the ETPCA meanwhile circulated a proposed "Agreed Final Judgment" to implement all of the stipulations presented at the September 12 docket call. The Baileys filed a response repudiating the stipulations. Pet. App. A9.

On July 18, 1989, the court held a hearing to provide the Baileys with the opportunity to show cause why summary judgment should be set aside and the court should not adopt the proposed Agreed Final

Judgment. The court specifically asked the Baileys if they had evidence of fraud or mutual mistake concerning the stipulations. Mr. Bailey admitted that he had no such evidence. The court subsequently declined to disturb its order granting summary judgment to the FDIC and entered the ETPCA's proposed Agreed Judgment implementing the stipulations. Pet. App. A8-A9, A20-A25.

3. The court of appeals affirmed the judgment in favor of the creditors. Pet. App. A1-A19. The court remarked that the only relevant issues were whether the stipulations were valid under Texas law and whether the judgment accurately reflected the terms of those stipulations. *Id.* at A10. After observing that in the absence of fraud parties to an agreement are charged under Texas law with knowledge of its terms, the court noted that the Baileys had been extended the opportunity to provide evidence of fraud or mutual mistake but failed to do so. *Id.* at A11-A12.

The court of appeals further noted that the Baileys raised several new arguments on appeal, including allegations of inadequate representation, coercion to sign the stipulations, and failure of the stipulations to reflect accurately the terms of the settlement agreement they reached with their creditors. Pet. App. A13-A14. The court of appeals concluded that since none of those contentions had been raised in the district court, it was barred from considering them on appeal. *Id.* at A14-A15. With respect to the Baileys' claim that they were denied the opportunity to present those arguments to the district court, the court of appeals found that the district court had afforded them ample opportunity to assert their claims, but they simply had failed to do so. *Id.* at A15-A19.

ARGUMENT

Petitioners contend that the district court wrongly denied them the opportunity to raise certain issues of fact at the hearing on July 18, 1989, and that the court of appeals incorrectly determined that the record showed that the district court had given them an opportunity to raise the issues. Contrary to petitioners' fact-bound contentions, the decision of the court of appeals is correct. In addition, its holding does not conflict with any decision of this Court or of any court of appeals. Further review by this Court is therefore not warranted.

Petitioners assert that the district court placed "improper restraints" on the Baileys at the hearing on July 18, 1989. Pet. 22, 24-26. The improper restraints allegedly consisted of the district court's instructions to Mr. Bailey to limit his remarks to whether he was aware of any evidence of fraud or mutual mistake of fact with respect to any matter relating either to the settlement agreement between the parties or the stipulations that served as the basis of the agreement. *Id.* at 12-13, 24-26, 28.

The court of appeals correctly concluded that petitioners' assertion was not supported by the record of the hearing. Pet. App. A15-A17. As that court noted, at the outset of the hearing the district court sought to limit the discussion to the issues of fraud and mutual mistake, but subsequently expanded the scope of the hearing. The district court specifically extended to Mr. Bailey the opportunity not only to reveal any fraud or mistake underlying the stipulations, but to present to the court "anything else" that he wished. *Id.* at A16-A17. Mr. Bailey used this opportunity to present several arguments to the district court, none of which related to fraud and mistake or to the validity of the stipulations. *Id.*

at A17-A18. Moreover, the court of appeals noted that the district court provided the Baileys with the opportunity to file responses to the ETPCA's proposed Agreed Judgment and the FDIC's motion for summary judgment. The district court placed no restraints on the issues that might be raised in these responses. However, the Baileys failed to plead any ground other than fraud in their responses to the FDIC's motion and the ETPCA proposal. *Id.* at A18. Accordingly, the record of the proceedings below establishes that the Baileys were not improperly restrained by the district court, had ample opportunity to present their arguments, but simply failed to do so.*

* Petitioners also contend that the court of appeals improperly failed to consider a letter from an FDIC employee to Senator Phil Gramm. Pet. 6-7, 20. According to petitioners, in the letter the FDIC admits, contrary to its position in the district court, that *D'Oench, Duhme* and 12 U.S.C. 1823(e) "*do not apply* in the instant case." Pet. 6. As an initial matter, the letter was never introduced into evidence, so the court of appeals properly ignored it. In any event, petitioners misconstrue the letter. The letter was written in response to Mr. Bailey's letter to Senator Gramm asking: "Is the Federal Deposit Insurance Corporation (FDIC) protected by law, made by the U.S. Congress, to have a '*shield*' that says even though maybe the Bank did unlawfully foreclose, they have been taken over by the FDIC (although they were solvent) and there is nothing anyone can do about it?" Pet. App. A33. The FDIC employee, who apparently had no knowledge of the facts of this case, merely stated in response that "no such special protection exists" and suggested that Mr. Bailey could bring a lawsuit alleging "unlawful or tortious foreclosure." *Id.* at A37, A38. That response, which correctly rejects the sweeping assertion made by Mr. Bailey in his letter, hardly suggests that neither this Court's decision in *D'Oench, Duhme* nor Section 1823(e) have any applicability to this case. The issue in this case was not whether there was "nothing anyone can do" about an "un-

The decision of the court of appeals to deny petitioners' claims on account of their failure to raise their factual arguments before the district court is consistent with, and well supported by, the decisions of other courts on this issue. The courts of appeals have repeatedly rejected efforts by complainants to assert grounds for relief that differed from those asserted before a trial court. See *Forro Precision, Inc. v. IBM Corp.*, 745 F.2d 1283, 1286 (9th Cir. 1984); *Katsev v. Coleman*, 530 F.2d 176, 179 (8th Cir. 1976); *Inland Cities Express, Inc. v. Diamond National Corp.*, 524 F.2d 753, 755 (9th Cir. 1975).

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARK I. ROSEN
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

JOAN E. SMILEY
Senior Counsel

ROBERT D. MCGILLICUDDY
Counsel
Federal Deposit Insurance Corporation

DECEMBER 1990

lawful[] foreclosure," but whether petitioners' alleged homestead exemption was valid against the FDIC, even though they had asserted that the tracts were not their homestead when negotiating the promissory notes.